

STATE OF MICHIGAN
COURT OF APPEALS

GREGORY C. WITTMAN,

Plaintiff-Appellant,

v

NANCY C. IRISH and SHAMROCK
INSTALLATIONS, INC.,

Defendants-Appellees.

UNPUBLISHED

November 25, 2003

No. 240965

Washtenaw Circuit Court

LC No. 01-001460-CK

Before: Murray, P.J., and Gage and Kelly, JJ.

MEMORANDUM.

Plaintiff appeals as of right from an order granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(8) based on the failure to state a claim for age discrimination in employment. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff alleged that he was terminated from his employment as a tile setter when he did not complete a tile repair job in the time allotted. He further alleged that a younger employee was sent to tile and grout the project.

For purposes of deciding a motion under MCR 2.116(C)(8), the allegations in the complaint must be accepted as true. Such a motion tests the legal sufficiency of a claim by the pleadings alone. *Beaudrie v Henderson*, 465 Mich 124, 129-130; 631 NW2d 308 (2001). Summary disposition is appropriate when a claim is so clearly unenforceable as a matter of law that no factual development could possibly justify a judgment in favor of the nonmoving party. *Trost v Buckstop Lure Co*, 249 Mich App 580, 584; 644 NW2d 54 (2002). To establish a prima facie case of age discrimination under either the Elliott-Larsen Civil Rights Act, MCL 37.2101 *et seq.*, or the Age Discrimination in Employment Act of 1967 (ADEA), 29 USC 621 *et seq.*, the plaintiff must show that he was (1) a member of a protected class, (2) terminated from his employment, (3) qualified for the position, and (4) replaced by a younger person. *Meagher v Wayne State University*, 222 Mich App 700, 711; 565 NW2d 401 (1997); *Wilkins v Eaton Corp*, 790 F2d 515, 520 (CA 6, 1986).

Plaintiff avers for the first time on appeal that he was forty-four years old at the time he was terminated from his employment. While we may presume defendants knew plaintiff's age at

the time of his hire, defendants' knowledge of plaintiff's age did not replace the requirement that plaintiff adequately plead that he was a member of a protected class. Regardless of whether he was in a protected class, however, plaintiff failed to plead that he was qualified for the position. Plaintiff seems to rely on the allegations that he was a union member and was initially hired by defendants to do the job. But, plaintiff does not explain how these facts would establish his qualifications. Further, plaintiff alleged that someone else was assigned to take over the specific job that he was doing and that this person was younger. But, the fact that a younger employee was assigned to finish a task would not establish that plaintiff's actual position was filled by a significantly younger person. Accordingly, the trial court properly granted summary disposition to defendants.

Affirmed.

/s/ Christopher M. Murray
/s/ Hilda R. Gage
/s/ Kirsten Frank Kelly